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NO. 80-1486

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

OMNI FARMS, INC.,

Appellant,

VS.

ARKANSAS POWER & LIGHT COMPANY,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

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May it please the Court:

Appellee moves that the appeal herein taken be dismissed on the grounds that said appeal does not present a substantial federal question, that the Order of Taking appealed by Appellant is not a final judgment reviewable either by appeal or certiorari, and that Appellant has not drawn in question the validity of a state statute as being repugnant to the United States Constitution.

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OPINION BELOW

This is an appeal from a decision of the Supreme Court of Arkansas rejecting Appellant's contentions that Appellee failed to negotiate in good faith before instituting condemnation proceedings and that Appellant was denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States because it was not furnished proper notice of the impending condemnation.

JURISDICTION

Appellant purports to appeal pursuant to 28 U.S.C. §1257(2). Alternatively, Appellant seeks review by writ of certiorari under 28 U.S.C. §2103. For the reasons developed in the Argument portion of this Motion, appeal is not the proper avenue for review and certiorari should not be granted.

STATEMENT OF THE CASE

Act 164 of the 1973 Arkansas General Assembly as amended by Act 866 of 1977 of the same state legislature (the Act) is titled the "Utility Facility Environmental and Economic Protection Act." The Act (Ark. Stat. §§73-276 — 73-276.18) is printed in its entirety at pages 28-49 of the Appendix to Appellant's Jurisdictional Statement. Among other things the Act prescribes the procedures to be followed by a public utility before The Arkansas Public Service Commission (the Commission) and the substantive prerequisites for obtaining from the Commission a Certificate of Environmental Compatibility and Public Need (Certificate) to construct a "major utility facility" as defined by the Act. Electric transmission lines are included in the definition of "major utility facilities." Section 16 of the Act (Ark. Stat. §73-276.15) provides the substantive and procedural framework for a public utility such as Appellee to exercise the power of eminent domain when necessary to acquire an interest in land upon which to erect approved major utility facilities.

Appellant (OMNI) is an Arkansas corporation and the owner of a 1,500 acre farm in Lonoke County, Arkansas. Appellee (AP&L) is an Arkansas corporation and a wholly owned subsidiary of Middle South Utilities, Inc. Its principal business is the production and sale of electricity.

On December 14, 1977, Appellee filed an Application with the Commission seeking a Certificate to construct, maintain, and operate electric transmission lines and associated substation facilities as defined by the Act. An Environmental Impact Statement (EIS) accompanied the filing.

On February 3, 1978, the Commission entered an Order scheduling a hearing on Appellee's Application on procedural matters only for March 14, 1978. The Application was assigned Commission Docket No. U-2904. This Order directed that testimony would be heard at a future date, that landowners whose property would be crossed by the proposed transmission line should be notified of the date testimony would be heard, and that Appellee should serve a copy of the Order on all of these same landowners.

On or about February 13, 1978, Appellee mailed a letter bearing that date to Appellant and all other landowners along the transmission line route by ordinary mail enclosing a copy of the Commission's February 3, 1978 Order. Additionally, this letter notified Appellant of Appellee's Application to construct a 500,000 volt electric transmission line across Appellant's land on a preferred route, enclosed photographs showing typical structures that may be used in construction of the transmission line, notified Appellant of the time and place of the March 14, 1978, procedural hearing, advised Appellant that the Commission would later schedule a hearing concerning the Application and the proposed transmission line route, invited Appellant to seek information from Appellee by telephone or letter as to its right to intervene or make a limited appearance in the proceeding before the Commission, and promised to notify Appellant of the time and place of the future hearing upon receiving advice of same from the Commission. The name, address, and telephone number of Appellee's Manager of Land and Right-of-Way was also included, and Appellant was invited to address all inquiries to him. Appellant admits receiving this first letter and enclosures.

On December 27, 1978, Appellee filed an Amended and

Substituted Application for a Certificate to construct the same facilities.

On or about January 16, 1979, Appellee mailed another letter to Appellant and all other landowners along the transmission line route imparting the same type of information as the earlier letter. In addition, a map was enclosed showing the approximate location of a Preferred Route and an Alternate Route. Appellant was advised that both routes crossed its lands. Appellant admits receiving this second letter and enclosures.

On February 5, 1979, the Commission entered an Order setting Appellee's Application for a hearing on its merits for March 27, 1979, in the Commission's Hearing Room.

On or about February 14, 1979, Appellee mailed another letter to Appellant and all other landowners along the transmission line route enclosing a copy of the Commission's February 5, 1979, Order and inviting them to attend the March 27, 1979, hearing. This letter again offered information on intervening or making a limited appearance, and the name, address, and toll-free telephone number of Appellee's Manager of Land and Right-of-Way was again provided. Appellant denies receiving this third letter and enclosures.

On July 30, 1979, the Commission entered an Opinion and Order in Docket No. U-2904 granting Appellee's Application for a Certificate. The project approved by the Certificate was estimated by Appellee to cost $81,970,000 to construct. It consisted of two separate 500,000 volt transmission lines 86.67 miles in length and 82.94 miles in length, respectively, and related substation facilities. Only one of these transmission lines would cross Appellant's

farm just as each letter had stated. Appellant took no part in the March 27, 1979, proceedings before the Commission.

On or about September 12, 1979, Appellee again wrote Appellant and all other landowners along the transmission line route advising that Appellee's land surveyors would soon be on their lands for the purpose of staking the transmission line easement. Landowner cooperation was solicited. Appellant admits receiving this fourth letter.

On or about February 11, 1980, Appellee's survey crew arrived at Appellant's farm to begin surveying the transmission line easement across Appellant's farm. Permission to survey was denied initially by Appellant, but four days later Appellant did give Appellee's survey crew permission to enter the farm and survey the easement, which is 180 feet wide and 4,210 feet in length containing 17.4 acres, more or less. At that time Appellee first learned from its surveyors that Appellant had just begun construction of a dirt landing strip running in a perpendicular direction across Appellee's proposed transmission line easement.

On March 5, 1980, Appellant filed a Petition with the Commission requesting that Docket No. U-2904 be reopened for the purpose of hearing evidence concerning the final route of the transmission line that was to cross Appellant's farm per the Commission's Order of July 30, 1979. The Commission denied the Petition on April 4, 1980. Appellant has not appealed from that Order.

After attempting to negotiate the purchase of the easement, Appellee filed a Complaint in the Circuit Court of Lonoke County, Arkansas, on March 10, 1980, against Appellant seeking to condemn the easement across Appellant's farm for the electric transmission line. A hearing was

conducted on April 7, 1980, and Appellee was awarded an Order of Entry on May 2, 1980, upon depositing $15,000 into the registry of the court. That Order of Entry was subsequently stayed on May 5, 1980, except that Appellee was given the right to survey and stake its easement.

Despite the Stay Order of the Lonoke Circuit Court still in effect, Appellant filed a separate suit against Appellee in the Chancery Court of Pulaski County, Arkansas, on July 15, 1980, seeking the identical injunctive relief requested in its Application for Writ of Injunction filed with this Court. That action is still pending, and Appellant has not requested a hearing on the merits. The style of that case is *Omni Farms, Inc. v. Arkansas Power & Light Company,* Pulaski Chancery 80-3244, First Division.

Appellant appealed from the Order of Entry to the Arkansas Supreme Court on April 28, 1980, and, among other things, challenged the statutory eminent domain procedures followed by Appellee as "violating Appellant's due process rights."

Specifically, Appellant has urged that, although Appellee notified Appellant by letter on two occasions that Appellee had made application to the Commission for a certificate to build and locate its facilities across Appellee's farm, Appellant did not receive a third letter mailed by Appellee notifying Appellant of the exact date of the hearing on Appellee's application before the Commission. This, Appellant contends denied it due process of law.

The Arkansas Supreme Court affirmed the trial court Order of Entry in favor of Appellee, finding that Appellant had been accorded due process of law. Appellant filed a Petition For Rehearing with the Supreme Court of Arkan-

sas on November 21, 1980. By Per Curiam Order dated December 8, 1980, the Petition for Rehearing was denied.

There still has been no trial on the merits on the issue of the amount of just compensation owing to Appellant by Appellee for the easement condemned.

Appellant is now attempting to appeal from the decision of the Arkansas Supreme Court styled *Omni Farms, Inc. v. Arkansas Power & Light Company*, 271 Ark. 61, 607 SW2d 363 (1980). The text of that decision is printed at pages 10-17 of the Appendix to Appellant's Jurisdictional Statement. Appellant filed its Notice of Appeal with this Court on December 31, 1980.

On February 27, 1981, and March 2, 1981, respectively, Appellee received copies of Appellant's Application for Writ of Injunction and Jurisdictional Statement filed in this proceeding. This is a response to the Jurisdictional Statement.

Appellant's Jurisdictional Statement purports to pose two questions presented on appeal to this Court:

I. Whether the Appellee in good faith negotiated as required by the Arkansas Eminent Domain Statute.

II. Whether the Appellant's due process rights were violated by Appellee's failure to give personal notice of the administrative hearing on the major utility route affecting its real property, as allowed by Arkansas statute.

ARGUMENT

I.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. WHETHER APPELLEE NEGOTIATED IN GOOD FAITH WITH APPELLANT TO PURCHASE THE EASEMENT AND TO WHAT EXTENT ARKANSAS EMINENT DOMAIN STATUTES REQUIRE SUCH NEGOTIATION DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The total absence of a substantial federal question from Appellant's first question presented on appeal dealing with good faith negotiation is self-evident. In fact, Appellant in phrasing the question, complains of a violation of a state statute! No federal constitutional issue or right is even remotely identified. Moreover, Appellant simply poses the naked question without further discussion or citation of authority. No reference is made to the "good faith negotiation question" in the portion of Appellant's Jurisdictional Statement found at pages 4-7 styled Statement of Substantial Questions. In short, this ground for appeal is both fictitious and frivolous.

Moore's Federal Practice §512.01 analyzes the substantial federal question requirement for appellate review by this Court stating that the guidelines for refusing jurisdiction on that basis are general. This Court refuses to review a case in which the federal question is frivolous, *Equitable Life Assurance Society v. Brown,* 187 U.S. 308 (1902). Surely it is even more frivolous when the question presented is not even a federal one!

Moore cites *Milheim v. Moffat Tunnel Improvement District,* 262 U.S. 710 (1923) for the proposition that:

> . . . The Court will dismiss an appeal from, or a writ of certiorari as improvidently granted to, a state court 'if the questions on which the decision depends are found to be so wanting in substance as not to need further argument.'

Moore then summarizes the substantial federal question requirement as follows:

> In accordance with these principles of substantiality the Supreme Court will refuse to review state court judgments where the federal question is 'utterly without foundation;' no substantial federal question is raised in light of prior Supreme Court decisions; the only question of law left open involves state practice; the state court decision can be interpreted as construing a local contract under local law thereby avoiding a constitutional question; where it is clear that state statutes and state court rules do not go beyond the range of state action allowed by the Fourteenth Amendment and in related situations.

Appellant's first question presented flunks the tests for substantiality enumerated by *Moore*. Probably the rule announced in *Seaboard Air Line Ry. Co. v. Watson,* 287 U.S. 86 (1932) that this Court will refuse to review state court judgments where the federal question is "utterly without foundation" is most appropriate when considering Appellant's first question presented.

B. APPELLANT'S ALLEGED FAILURE TO RECEIVE PERSONAL NOTICE OF AN ADMINISTRATIVE HEARING DETERMINING THE NECESSITY FOR AND LOCATION OF AN ELECTRIC TRANSMISSION LINE EASEMENT ACROSS APPELLANT'S LAND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Much of what has been said about Appellant's first question presented pertaining to good faith negotiation has relevance to its second question presented pertaining to notice. Neither question presents a substantial federal issue. This Court has already spoken on several occasions to the second question pertaining to notice raised by Appellant, and it has consistently answered that question adversely to Appellant's position. Accordingly, this Court should refuse to review a state court judgment where no new substantial federal question is raised in light of prior United States Supreme Court decisions. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952).

Not only has Appellant failed to raise a substantial federal question to justify review by appeal, Appellant has failed to cite special and important reasons to justify review by writ of certiorari. United States Supreme Court Rule 17.1 requires that such special and important reasons be expressed.

This Court has already decided the issue of Appellant's right to a hearing on the *legislative* or *administrative* questions of Appellee's need for the easement and the location of the easement. It has been the holding of this Court since at least 1919 that Appellant is *not* entitled to a hearing on these issues. Accordingly, it follows that notice of such a

hearing is not required either. *Bragg v. Weaver,* 251 U.S. 57 (1919). All that is essential to due process of law is that a landowner be afforded a trial on the issue of the amount of just compensation for the land condemned and reasonable notice of that trial.

Actually, the nature of the power of eminent domain is even more basic and fundamental than the constitutional provision of due process of law. The power of eminent domain does not actually originate in a legislative or constitutional grant of authority but is an inherent attribute of the sovereignty of the State itself. The procedure for exercising the power is a matter of regulation by the state legislature. *Rindge Co. v. Los Angeles County,* 262 U.S. 700 (1923); *Bragg v. Weaver, supra*; *Joiner v. City of Dallas,* 380 F. Supp. 754 (N.D. Tex. 1974), affirmed 419 U.S. 1042, rehearing denied, 419 U.S. 1132 (1975).

One of the more recent discussions on the subject of the application of procedural due process to the law of eminent domain is found in *Joiner v. City of Dallas, supra.* At 380 F. Supp. 771, the United States District Court stated:

> The power of eminent domain, whether exercised by the state legislature or a municipal corporation, is a unique sovereign right fundamental to the performance of governmental responsibilities. This power is essentially and fundamentally legislative, and its character cannot be changed by switching the labels under which it is pursued. As stated by the Supreme Court in a challenge to the condemnation of property for a seacoast highway: 'And so construed this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the landowners before

> such resolution is adopted, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. Where the intended use is public, the necessity and expediency of taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision . . .' *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 (1923).

Joiner v. City of Dallas, supra, further addresses the question of procedural due process in eminent domain proceedings at page 764:

> That the power of eminent domain must be exercised in accordance with due process of law is an explicit requirement under the Fourteenth Amendment. The perimeters of the Due Process requirement in eminent domain proceedings have been sharply defined through a series of Supreme Court decisions, however, and the customary 'due process' attack has limited chance of success. For example, the Court has repeatedly characterized the condemnor's decision on the necessity for a taking and the quantity to be appropriated as legislative and has, therefore, denied to landowners the right to participate in that decision-making process or to litigate on federal constitutional grounds the decision to condemn private property. (Numerous citations omitted).

Coincidentally, the Commission in its Opinion and

Order entered in Docket No. U-2904 addressed a similar issue of notice now raised by Appellant. At pages 21 and 22 of its Opinion and Order in a concurrence by Chairman Norton, the Commission discussed the issue of notice of the hearing before it in the following words:

> I do not believe these concerns reflect a legal technician's overemphasis on procedure. Grave issues are involved here, as are important interests which deserve close protection. Article II, Section 22 of our Constitution states:
>
> > The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.
>
> Despite the precedence and height of the right of property, however, the law of eminent domain does not permit a property owner to question the necessity of depriving him of his property. *Sloan v. Lawrence County,* 134 Ark. 121, 203 SW 260 (1918). Nor does the Fourteenth Amendment to the United States Constitution require an opportunity to be heard as to the necessity of the taking. *North Laramie Land Company v. Hoffman,* 268 U.S. 276 (1925).
>
> This condition of the law results from the judicial determination that questions of the necessity or expediency of a taking are not issues for courts to resolve.
>
> They are legislative questions, no matter who

> may be charged with their decision, and a hearing thereon is not essential to due process.
>
> *Mississippi and R. River Boom Company v. Patterson,* 98 U.S. 403, 406 (1879).

Apparently for the first time since this litigation began, Appellant in its Jurisdictional Statement attempts to discredit Ark. Stat. §§73-276 — 73-276.18 because they do not require personal notice to Appellant and other similarly situated landowners of the *legislative* hearing on Appellee's Application for a Certificate conducted by the Commission. Only notice by publication in a newspaper is required by the statutory scheme with respect to landowners whose lands may be ultimately affected by the hearing. Appellant and other similarly situated landowners still had an opportunity to sell an easement to Appellee or litigate with Appellee in a subsequent eminent domain suit of which they would receive personal notice.

The distinction between the *legislative* function of the Commission, which is an administrative agency of state government, to determine the need for and location of a transmission line easement, and the *judicial* function of the courts to ascertain just compensation to the landowner for the land condemned is obvious. Appellant is no more entitled by right or due process of law to personal notice of the legislative hearing of the Commission than it is to receive personal notice of the commencement of the biannual session of the Arkansas General Assembly. Accordingly, the Appellant's reliance on *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) is misplaced. *Mullane* deals with the due process requirement of personal notice of a probate proceeding, a *judicial* hearing, under the circumstances of the address of a trust beneficiary being

known, and why notice by publication is constitutionally defective under that circumstance. Interestingly, *Mullane* held that notice by mail would be sufficient as opposed to notice by service of process. Appellant admitted receiving three out of the four notices mailed by Appellee.

Appellant also claims reliance upon *Boddie v. Connecticut*, 401 U.S. 371 (1971). *Boddie* held that the State of Connecticut denied due process of law to indigent persons by refusing to permit them to bring divorce actions except on payment of court fees and service-of-process costs which they were not able to pay. To Appellee's knowledge, Appellant is seeking neither a divorce nor claiming indigency. Since notice was not an issue in *Boddie* either, Appellee confesses that Appellant's reliance on *Boddie* is a mystery beyond Appellee's understanding. Perhaps the solution is that *Boddie* is no more in point than the questions raised by this appeal are substantial federal ones in nature.

II.

THE ORDER OF TAKING APPEALED BY OMNI IS NOT A FINAL JUDGMENT REVIEWABLE BY APPEAL OR BY CERTIORARI AS REQUIRED BY 28 U.S.C. §1257 (2) AND (3).

Since the Judiciary Act of 1789, it has been a prerequisite for the review of a state judgment by this Court that such judgment be a *final judgment* rendered by the highest court of the state. This Court lacks jurisdiction to hear Appellant's appeal or petition for writ of certiorari because 28 U.S.C. §1257 provides for review by this Court of *final judgments or decrees* rendered by the highest court of a state. The Order of Entry of the Lonoke County, Arkan-

sas Circuit Court in this eminent domain proceeding is *not* a final judgment or decree. It was entered prior to a trial on the merits on the issue of the amount of just compensation owing by the condemnor Appellee to the condemnee Appellant. That trial still has not occurred.

This Court determines what constitutes a final judgment or decree because this issue becomes a federal matter. What might be a final judgment from the standpoint of a state court is not necessarily a final judgment in the federal context. This is especially true of an eminent domain case where the ultimate issue of the amount of just compensation to the landowner has not been determined. *Grays Harbor Logging Co. v. Coats-Fordney Logging Company,* 243 U.S. 251 (1917) and *Catlin v. United States,* 324 U.S. 229 (1945).

In *Catlin, supra,* at pages 233-234 it was held that the rule that an order determining the right to take in a condemnation proceeding in advance of determination of just compensation lacks finality

> . . . applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute 'judgments of condemnation,' i.e., of the right to condemn particular property, are reviewable before compensation is found and awarded . . . The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piece-meal litigation . . . Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals.

This Court has not waivered from the position just

stated. In fact, as recently as 1975 this Court established four categories of cases in which it has considered a state court's decision on federal issues to be final and has taken appellate jurisdiction although further proceedings were anticipated in the lower courts. Condemnation proceedings just like the case *sub judice* were specifically excluded from those four categories. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

III.

APPELLANT HAS NOT DRAWN IN QUESTION THE VALIDITY OF A STATE STATUTE AS BEING REPUGNANT TO THE UNITED STATES CONSTITUTION.

Appellant has not "drawn in question" the validity of a state statute on the ground of its being repugnant to the United States Constitution. At least Appellant failed to do so before the Arkansas Supreme Court. Such is required before this Court acquires jurisdiction to review this case on appeal. 28 U.S.C. §1257(2). Such is also required for review on writ of certiorari under one clause of 28 U.S.C. §1257(3). Appellant must pin its hope for review by this Court by writ of certiorari on the clause in 28 U.S.C. 1257 (3) that reads:

> . . . or where any title, right, privilege or immunity is specially set up or claimed under the constitution . . .

The Lonoke County Circuit Court in its Order of Entry dated May 1, 1980 did state:

> . . . The applicable laws, statutes and regulations

> which establish the guidelines and procedures by which . . . a private utility may acquire private property by eminent domain action, establish the necessity therefor, and prescribe the procedures for such action are . . . constitutional and not in deprivation of the due process rights of [Appellant]. (Pages 18-21 of Appendix to Jurisdictional Statement).

However, on appeal to the Arkansas Supreme Court the Appellant simply argued that its due process rights had been violated — not that the applicable Arkansas eminent domain statute was unconstitutional because it did not afford Appellant due process of law by way of failing to require reasonable notice of a *legislative* hearing before the Commission. As stated by the Arkansas Supreme Court in the opinion of *Omni Farms, Inc. v. Arkansas Power & Light Company* printed at pages 10-17 of the Appendix to Appellant's Jurisdictional Statement:

> Omni's alternative ground for dismissal is its assertion that the governing statute denies due process of law. The statute is Act 164 of 1973, amended by Act 866 of 1977. Ark. Stat. Ann. §§73-276.1 through 276.18. Omni's argument is really directed not so much to the terms of the statute as to Omni's failure to receive sufficient notice of the Public Service Commission proceeding by which AP&L was authorized to cross Omni's land. (p. 14)
>
> Omni's due process argument boils down to this. It complains that AP&L failed to give it the promised notice of a commission hearing, the nature of which Omni has not shown. Omni did receive ac-

> tual notice, once in February, 1978, and again in January, 1979, that the line was to cross its ranch. Details and sources of information were supplied, but Omni and Wright apparently paid little if any attention to the matter until receiving notice that AP&L's surveyors would be on the ground soon after September, 1979, more than 18 months after the February letter. We still do not know exactly what Omni's objections to the proposed line may be, because the record is practically silent on that pivotal point. We cannot say that Omni has proved a denial of due process of law by any lack of notice of the impending condemnation. (p. 17)

As indicated from the excerpts from the Arkansas Supreme Court decision quoted above, Appellant had not "drawn in question" the validity of the applicable Arkansas eminent domain statutes before that Court. It was not until Appellant filed its Jurisdictional Statement with this Court that Appellant raised for the first time on appeal the constitutionality of the Arkansas eminent domain statutes. That is fatal to this appeal. In *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969) this Court made the following statement:

> . . . [T]he fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions . . .

As further evidence of Appellant's failure to draw in question the validity of the Ark. Stat. §§73-276 — 73-276.18

before the Arkansas courts, Appellant did not certify to the Attorney General of Arkansas that a constitutional challenge had been made until it filed its Jurisdictional Statement in this Court. Appellant finally made such certification pursuant to 28 U.S.C. §2403(b) which provides:

> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Appellant apparently ignored Ark. Stat. §34-2510. It requires notice to the Arkansas Attorney General when the constitutionality of a state statute is questioned in a state court proceeding. That statute provides:

> When the declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a munici-

> pal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard.

It is indeed ironic that Appellant complains of lack of notice in the context of notice allegedly guaranteed by the Fourteenth Amendment of the United States Constitution while at the same time Appellant waited until filing its Jurisdictional Statement before giving notice to the Arkansas Attorney General of its alleged challenge to the constitutionality of a state statute. Appellant should have given that notice while this case was still pending before the Circuit Court of Lonoke County, Arkansas.

In addition, since the Arkansas courts specifically made a finding of fact that Appellant had adequate notice of the Commission hearing, Appellant cannot even be heard on writ of certiorari about any "title, right, privilege or immunity claimed under the constitution" under 28 U.S.C. §1257(3). That finding of fact is not reviewable.

IV.

CONCLUSION

Appellant has brought an unwarranted appeal, and it should be dismissed for lack of the jurisdictional requirements discussed hereinabove, with all costs being assessed against Appellant.

IT IS SO MOVED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court and Attorney of Record in this matter, certifies that the appropriate number of copies of the foregoing Motion in the Alternative to Dismiss or Affirm has been furnished to counsel for Appellant and others shown below by placing same in the U. S. Mail, postage prepaid, properly addressed on this 30th day of March 1981: John B. Thurman, Thurman & Capps, Ltd., No. 2504 McCain Place - Suite 201, North Little Rock, Arkansas 72116; The Honorable Cecil A. Tedder, Circuit Judge, Wilbur D. Mills Courts Bldg., Searcy, Arkansas 72143; Dona Williams, Arkansas Supreme Court Clerk, Justice Building, Little Rock, Arkansas 72201, and The Honorable Steve Clark, Arkansas Attorney General, Justice Building, Little Rock, Arkansas 72201.

/s/ Robert L. Robinson, Jr.

NO. 80-1486

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1980 TERM

OMNI FARMS, INC. ..... *Appellant*

vs.

ARKANSAS POWER & LIGHT ..... *Appellee*

ENTRY OF APPEARANCE

I, Robert L. Robinson, Jr. of House, Holmes & Jewell, P.A., law firm, hereby enter my appearance as counsel of record for the Appellee, Arkansas Power & Light Company.

Respectfully submitted,

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By: /s/ ROBERT L. ROBINSON, JR.